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CHARLES ELMORE CR

Supreme Court of the United States

October Term, 1931

No. 171

FIRST NATIONAL BANK OF BOSTON,
Executor of the Estate of Edward H. Haskell, Deceased,
Appellant,

v.

STATE OF MAINE,
By Clement F. Robinson, Attorney General
Appellee.

Appeal from the Supreme Judicial Court of the State of Maine.

BRIEF FOR THE STATE OF MAINE

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v.

STATE OF MAINE,
Clement F. Robinson, Attorney General,
Appellee.

BRIEF FOR THE STATE OF MAINE

A.

STATEMENT OF THE CASE

The only question in this case is the constitutionality of the provision in the statutes of Maine whereby an inheritance tax of $30,139.88 was levied by the taxing authorities of Maine upon the Estate of Edward H. Haskell, a resident of Massachusetts, by reason of the transfer under his will of shares of stock in the Great Northern Paper Company, a Maine corporation. Substantially all the property of the corporation, including real estate and mills, is located in Maine.

The inheritance tax originally assessed in Maine was over twice the amount of the present tax; viz, $62,330.41. An appeal from this assessment was taken to the highest court of the state, because an inheritance tax of $32,190.53, paid in Massachusetts, had not been allowed as a deduction.

Section 4 of the Maine Act, thus brought into issue, is as follows:

> "Property belonging to a deceased resident of this state which shall be distributed by order of the probate court subsequent to the second day of July, nineteen hundred nine, and which is not therein at the time of his death, shall not be taxable under the provisions of this chapter if legally subject in another state or country to a tax of like character and amount to that imposed by section one, and if such tax be actually paid or guaranteed or secured in accordance with the law of such other state or country; if legally subject in another state or country to a tax of like character, but of less amount than that imposed by section one and such tax be actually paid, guaranteed or secured as aforesaid, such property shall be taxable under the provisions of section one to the extent of the difference between the tax thus actually paid, guaranteed, or secured, and the amount for which such property would otherwise be liable under this chapter."

This appeal was dismissed by consent, the claimed deduction was allowed, and a judgment decree was entered in the Probate Court for the balance; to-wit, $30,139.88, this amount carrying interest from February 19, 1930.

The case is before the Supreme Court of the United States on appeal from a judgment of the Supreme Judicial Court of the State of Maine, sitting as a court of law, on a Superior Court report of the agreed facts in an action of debt brought by the Attorney General of the state to collect the Probate Court judgment decree above referred to.

The inheritance tax law of Maine is found in the Revised Statutes of Maine (1916) Chapter 69, Section 1 (*Record* p. 17), and has been held constitutional by the Maine courts,—*State v. Hamlin*, 86 Me. 495 (1894). The power of Maine to tax shares of stock in its own corporations under this statute has not hitherto been disputed, and as far as Maine law is concerned, is affirmed by the Supreme Court of Maine in this present case. All proceedings were taken effectively as far as the laws of Maine are concerned for taxing the property.

The case adds another problem to those recently considered by this court in four significant cases,—

Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83 (1929)
Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930)
Baldwin v. Missouri, 281 U. S. 586 (1930)
Beidler v. So. Carolina Tax Commission, 282 U. S. 1 (1930)

In brief, here is a chain of four links:

Safe Deposit-Virginia case,—no property tax in Virginia against Virginia beneficiaries on the whole value of a trust with securities kept and held in Maryland. Two of the court concur in result; one dissents.

Farmers Loan-Minnesota case,—no inheritance tax in Minnesota on transfer of Minnesota state and city bonds kept in New York belonging to a New York owner. New York inheritance tax paid. One of the court concurs in the result; two dissent.

Baldwin-Missouri case,—no inheritance tax in Missouri on transfer of bank deposits in Missouri banks, notes of Missouri citizens in part secured by Missouri mortgages, and U. S. bonds, all belonging to an Illinois resident and deposited in Missouri, apparently for permanent safe keeping. Illinois inheritance tax paid. Three of the court dissent, joining in two opinions.

Beidler-South Carolina case,—no inheritance tax in South Carolina on transfer of debts owed by South Carolina corporation doing business in South Carolina to Illinois resident shareholder. Estate conceded South Carolina inheritance tax on the shares. Illinois inheritance tax paid. No business situs as a fact in South Carolina. Two of the court concur unwillingly.

We shall refer to the three inheritance tax cases in this chain as "the recent Supreme Court cases." In none of them is there any indication that either state gave any credit in its tax assessment for the tax payable or paid in the other.

The present case brings two situations before this court for the first time since these four cases arose,—(1) multiple inheritance taxation where the tax paid in one state has been credited on the litigated tax demanded by the second state; and (2) an issue over the inheritance taxation of corporate shares. During the pendency of the present case, however, the latter problem has been before other courts with the following result:

Fisher v. Brucker, 41 Fed. (2d) 774, (D. C., Michigan 1930). Question of the right of Michigan to impose an inheritance tax upon the transfer of domestic shares of a non-resident owner not passed upon because reciprocity between Michigan and the non-resident's state was retro-actively effective. Appeal to C. C. A. dismissed on ground of lack of jurisdiction.

Estate of Sack,—Industrial Trust Company v. Tax Commission, 250 N. Y. Supp. 113, (May 15, 1931). Petition for vacating assessment of inheritance tax on transfer of New York shares of a non-resident, under 1909 Tax Law, dismissed on procedural grounds. The court ruled that *Re Bronson*, 150 N. Y. 1, justifying such taxation, remains law in New York unless or until overruled by competent authority.

Equitable Trust Co. v. Kentucky State Tax Commission, County Court, Jefferson County, Kentucky, December 13, 1930,—reported in 204 C. C. H. 11, 174, now pending on appeal in the Court of Appeals of Kentucky. Transfer of Kentucky corporation shares of a non-resident decedent held untaxable under the Kentucky inheritance tax law.

Gates v. Bank of Commerce, Supreme Court of Arkansas, June 29, 1931,—reported in 204 C. C. H. 11,490,—transfer of shares in Arkansas corporation with business and property located in Arkansas, belonging to Tennessee shareholder keeping his certificates in Tennessee, held taxable under Arkansas Inheritance Tax.

Estate of Lund,—Benson v. Minnesota, Supreme Court of Minnesota, May 15, 1931,—reported in 236 N. W. 626, 204 C. C. H. 11,414,—Minnesota inheritance tax enforced on transfer of shares of Wisconsin stockholder in Minnesota corporations having sole place of business and substantially all property in Minnesota.

B.

ARGUMENT

I.

Aside from questions of double taxation the incorporating state does and should have the power to require an inheritance tax on the transfer of shares.

(*a*) *It does have this power to tax.*

But for the possibility of double taxation which is progressively discussed in the four recent Supreme Court cases abovementioned, there can be no doubt but that the Maine inheritance tax in this case would be valid. Maine's highest court says so in the very case, and the cases elsewhere are a unit in favor of the power of the state of incorporation to tax the transfer of shares in such a corporation either inter vivos or at the death of the owner, as well as to tax the shares themselves as property, and this quite irrespective of the location of the property or business of the corporation.

In *R. I. Hospital Trust Co. v. Doughton*, 270 U. S. 69 (1926) this court rules against any inheritance tax in North Carolina on New Jersey shares of a Rhode Island citizen, even though the corporation is in business and has property in North Carolina, the opinion stating that,—

> "The state in which a corporation is organized may provide in creating it for the taxation in that state of all its shares, whether owned by residents or non-residents,"

and that,—

> "The shares have a situs in the state of incorporation."

In *Frick v. Pennsylvania*, 268 U. S. 473 (1925) in ruling that Pennsylvania cannot collect an inheritance tax on a Pennsylvanian's tangible personalty located in Massachusetts, *the court approves the practice in the case of deducting, in computing the Pennsylvania tax on Massachusetts corporation shares, the inheritance tax already paid in Massachusetts.*

In *Baker v. Baker*, 242 U. S. 394 (1916), in passing on the claim of the mother of an intestate to share in his personal property, in a case where the domicile of the decedent was in issue, the Court says that,—

> "It is equally clear that the state which has created a corporation has such control over the transfer of its shares of stock that it may administer upon the shares of a deceased owner and tax the succession."

The Court cites New York, Massachusetts, New Jersey and Illinois cases to this point.

Re Bronson, 150 N. Y. 1; 34 L. R. A. 238; 55 A. S. R. 632; 44 N. E. 707 (1896) is the leading state case on the point. Other cases are cited and quoted from in the Maine Court's opinion in the present case. (*Record* pp. 17-20). The cases are collected in a note in 42 A. L. R., pp. 365-6.

It is noteworthy that in the recent *Beidler-South Carolina* case the representatives of the estate did not question the power of the state of the incorporation to tax.

These inheritance tax cases originated in, and are a corollary to the well-established doctrine that the state of the incorporation may tax such shares under its property tax. The leading case is,—*Corry v. Baltimore*, 196 U. S. 466 (1904).

The cases affirming the corresponding power of the state of the domicile under inheritance and property taxes are not in point on our present contention. See for instance,—*Hawley v. Malden*, 232 U. S. 1 (1913); *Blodgett v. Silberman*, 277 U. S. 1 (1928).

(*b*) *This power to tax is an incident of the jurisdiction of the State over shareholders in its corporations.*

The ultimate basis and justification of this power of the state is the fact that the state created, protects and sustains the corporation. The stockholder has an interest in an entity

which came into being and exists only by the statutes of that state. By that law are its powers determined; under that law its management operates; to that jurisdiction must he and it go for instruction in case of doubt, and for permission to enforce and change the rights, duties or powers of the corporation and its shareholders; and in the courts of that state must it be dissolved when its end comes.

The Great Northern Paper Company receives its primary existence from the laws of Maine. Its right to own property and pay dividends to its shareholders, and their right to receive them, come from the laws of Maine. If one situs for the stock is sought, Maine has more grounds for claiming it than has Massachusetts. The entire capital stock of the corporation is employed in Maine, or if employed elsewhere it is only through the power given it by Maine.

On the fundamental economic and political theory that taxation and protection may well go hand in hand, Maine should therefore have the right to tax the shareholder.

(c) *This jurisdiction of a state over shareholders in its corporations has been affirmed by this court.*

In *Jellnick v. Huron Co.*, 177 U. S. 1 (1900) this Court had occasion to inquire into the nature of shares of stock in a Michigan corporation, and enforced the laws of that state, making shares of stock personal property within the state of Michigan. The existence of a transfer office outside of Michigan was immaterial.

> "The habitation or domicile of the company is and must be in the state that created it. The property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is whenever it is sought by suit to determine who is its real owner."

In *Tappan v. Merchant's National Bank*, 19 Wall. 490 (1874) this Court in passing on the power of taxation of shares of stock in a national bank, said,—

> "Every owner takes the property (shares of stock) subject to this power of taxation under state authority, and every non-resident by becoming an owner voluntarily submits himself to the jurisdiction of the state in which the bank is established for all purposes of taxation on account of his ownership. * * * * * The shareholder is protected in his person by the government at the place where he resides, but his property in this stock is protected at the place where the bank transacts its business."

In *Glen v. Liggett*, 135 U. S. 533 (1890) this Court expressly held that the laws of Virginia define the rights of a non-resident stockholder in a Virginia corporation.

(*d*) *The Maine Statutes exercise this jurisdiction.*

Even a cursory examination of the provisions of law relating to Maine corporations, found in Chapter 51 of the Revised Statutes of Maine of 1916 (Revision of 1930, c. 56), shows that the Legislature of Maine has exercised the jurisdiction of a state over its corporations. The Legislature has defined and delimited with exactitude what a Maine corporation is, and its relations to its stockholders and the world. Some of these provisions are summarized by the Supreme Judicial Court of Maine in its opinion in the present case. (*Record*, p. 19-20).

For instance, stock in a Maine corporation cannot be validly transferred except on the books of the corporation; the corporation cannot sell out its assets over the objection of a minority stockholder; and dissolution proceedings must be brought in the equity courts of Maine. These provisions are obviously of much more moment than the mere registration of a bond; they amount to much more than the mere recording of a transfer of property. Bonds registered in Maine cannot be fully transferred without an act done in Maine; but that is all Maine has to do about it. In the case of stocks, there are other antecedent, coincident and subsequent conditions provided by the law of Maine.

II.

"Business Situs"

Our argument up to this point carries us to the point of affirming the right of the State of Maine to regulate and tax the interests and transfers of shareholders in a Maine corporation even when the corporation has no connection with the state except by incorporation. It is, however, the fact that in the present case the Great Northern Paper Company is in a much more real sense a Maine corporation. It is not only incorporated here, but its property and mills are located here. In this case we do not need to limit ourself to the case of a corporation, merely incorporated or merely having a transfer office in the state.

There is no claim whatever that the certificates of stock themselves had a "business situs" in Maine. It is conceded that they were kept by the owner in Massachusetts at the time of his death. Our point is, however, that Maine is where the corporation "carries on," and to that extent the corporation may be said in some degree at least to have had a "business situs" in Maine.

These facts alone might not entitle Maine to levy an inheritance tax on non-resident share transfers.

See *Rhode Island H. T. Co. v. Doughton*, above cited.

But these facts may indicate that the corporation as distinguished, of course, from the mere certificates of its stock, has a "business situs" in Maine. The effect of a "business situs" has been specially referred to in the recent Supreme Court cases.

In the *Farmers Loan & Trust* case the majority opinion left for future consideration the question of inheritance taxation of a decedent's interest in a business in another state carried on as a unit.

In the *Beidler* case the state court ruled that the corporation had a business situs in South Carolina, but this Court failed to find the conclusion justified by the record.

It is submitted that these cases indicate that this Court in a proper case will rule in favor of taxation at the place of the situs of a business, of the transfer of a non-resident's ownership therein, in analogy with the property tax cases under the Louisiana law.

New Orleans v. Stempel, 175 U. S. 309 (1899)
Bristol v. Washington County, 177 U. S. 133 (1900)
State Board v. Comptoir, 191 U. S. 388 (1903)
Metropolitan Life v. New Orleans, 205 U. S. 395 (1907)
Liverpool etc. Co. v. New Orleans, 221 U. S. 346 (1911)

Whether in such case the Court should limit the taxation to the state of the business situs, or will also permit the state of the owner's domicile to tax, is not of importance in the present case, if the doctrine is established that at least the state of the business situs may tax, and if Maine is the state of the business situs.

The only recent case to discuss the point further is *Hill v. Carter*, 47 Fed. (2nd) 869; (C. C. A. 9th Circuit, March 9, 1931), where the court held that certain intangible property had acquired a business situs in the State of New York such that income from it was not subject to a Hawaiian income tax. The Court relied upon *Deganay v. Lederer*, 250 U. S. 376 (1919) which held taxable in the United States income from securities, including corporation stocks held and managed for a non-resident alien by an agent in this country.

Because of the distinction between debtor-creditor obligations and shares of stock, of which we shall speak later, it is not necessary in the present case to base the contention of the State of Maine on the theory of business situs, and the Supreme Court of Maine in its opinion from which appeal is taken, did not take the point. It is, however, submitted that there is sufficient in the record from which this Court can conclude

that the Great Northern Paper Company, with its property and plant substantially located in Maine, was a business operation conducted in this state. As such, the interest of its stockholder which Maine seeks to tax is, as a matter of degree at least, something in which Maine has a very real interest, and to which it is giving a very real protection, and a definite reason for dismissing the present appeal is thereby furnished.

III.

The recent Supreme Court cases do not necessarily deprive the State of Maine of its right to an inheritance tax on this transfer.

In none of these three recent cases were corporate shares involved; except by way of the executor's conceding South Carolina's right to tax them in the *Beidler* case. These cases deal with bonds, certificates of indebtedness, notes, bank deposits,—in short, *debtor-creditor obligations*; not as our case must, with shares in a corporation whose property and mills are substantially located in the incorporating state.

The difference between debtor-creditor obligations and corporate shares is more than a question of degree. The debtor and his creditor are involved in no such complex of rights and obligations as are the stockholder and his corporation. A debt in the hands of the creditor is intangible property, and it is also a chose in action; and if it is evidenced by a bond or a note, it is a negotiable security. It is nothing, however, more or less than a debt to the creditor. By holding it he does not enter into a definite status.

A shareholder does. He has a right to share in the management, profits and ultimate assets of his corporation. As expressed in 14 C. J. 318,—

> "A share of stock is not like a note a chose in action, but it is analogous to and in the nature of a chose in action, and has repeatedly been so classified."

A debt is simply money owing to a creditor. The creditor may transfer his right to receive the money wherever he is, and the debtor has no interest in the transfer, and, in the case of promissory notes and bonds, frequently has no knowledge whatever as to whom the debt is payable until it is demanded by the final owner. The creditor has no voice in anything the debtor may do except as it may in some manner defeat payment of the debt or diminish security if security is given. On the other hand, a stockholder in a corporation has so many rights that we will not attempt to enumerate all of them, but only will recall to the Court a few for the purpose of illustration, viz.: he may participate in the earnings of a corporation; he may vote in the election of directors to manage its affairs; he may consent or refuse to the closing up of the corporation and winding up of its affairs; and may participate in the distribution of its assets.

If the stockholder wishes to vote his share of stock in the Company, it is necessary for him or his executor to come to Maine, in person or by proxy, to do so. When the stockholder acquired his stock in the Company, he took the stock impressed with laws concerning corporations or corporate stock in existence in Maine at the time, and also subject to any law passed in the future regulating or affecting corporations, even though such laws be in the general laws of the state.

We submit that this Court may take these differences in the nature of the obligations as a reason for withholding an extension to this case of the doctrine that the domiciliary state has the exclusive right to tax.

IV.

If practicable, both the state of the incorporation and the state of the domicile should retain the right to an inheritance tax on this transfer.

We concede the jurisdiction of the domicile to tax the inheritance of shares of stock just as we believe that our opponents must concede the force of our citations as to the similar

power hitherto exercised by the state of incorporation. While both sides recognize the evils of double taxation, the chief difference between us is whether this evil is to be remedied by the complete surrender by the incorporating state of its right to tax.

We believe another remedy is practicable; but before considering it, let us mention three reasons for preserving if possible the right of both states to tax.

(*a*) *To avoid overruling cases.*

If both states can tax, many cases can stand unmodified which must be reversed if the court is to rule that the incorporating state must lose its tax right to the domiciliary state. So far in deciding the *Farmers Loan & Trust,—Baldwin* and *Beidler* cases, this Court has expressly overruled but one case,—*Blackstone v. Miller*, 188 U. S. 189 (1903). It has apparently by necessary implication overruled but one other, viz.—*Wheeler v. Sohmer*, 233 U. S. 434 (1913), which permits inheritance taxation of certain non-resident debtor-creditor securities at the place of deposit of the instruments.

If, however, the Court rules out the right of Maine to tax this transfer, as a corollary must naturally follow the overruling of the many cases already referred to which vest a state with this very power, and along with them, by necessary implication from the Court's adoption of a single form of solution for the double taxation problem, the cases already cited under the general property tax which vest the incorporating state with the power to tax the shareholders in its corporations, and the cases permitting the state of the business situs to tax business credits; and also the cases which permit double taxation of several other forms of property interests.

To stigmatize the double taxation of debtor-creditor securities under the inheritance tax merely extends to these securities principles already outlined for their taxation under the general property tax.

Under that tax, bonds have been held untaxable in the debtor's state, even when the bonds are secured by mortgage in the debtor's state; but the creditor's state can tax them.

State Tax on Foreign Held Bonds, 15 Wall. 300 (1873)
Kirtland v. Hotchkiss, 100 U. S. 491 (1879)

Mere temporary presence of commercial paper does not make it taxable.

Buck v. Beach, 206 U. S. 392 (1907)

Even bonds exempt from taxation where created may be taxed to the owner at his domicile, and a taxing state may discriminate against non-resident securities in taxing its resident.

Bonaparte v. Appeal Tax Court, 104 U. S. 592 (1881)
Kidd v. Alabama, 188 U. S. 730 (1902)

But double taxation of other property interests has been upheld. Within the same jurisdiction, at least, and in some instances between several jurisdictions, the Fourteenth Amendment does not prevent it.

Fort Smith Co. v. Arkansas, 251 U. S. 532 (1920),—permitting a state to tax its corporations for their stock in other domestic corporations, although individual shareholders are exempt.

Cream of Wheat Co. v. Grand Forks, 253 U. S. 325 (1920),—permitting a state to tax its corporations on the value of their stock, including property and business located elsewhere;—the corporation's "good-will" may apparently be taxed twice over in different states, once to the corporation and once to the stockholder.

Swiss Oil Co. v. Shanks, 273 U. S. 407 (1927),—permitting tax on oil as property and also on its production.

Hellmich v. Hellman, 276 U. S. 233 (1928),—permitting certain double taxation under the Income Tax law.

And see,—*Maxwell v. Bugbee*, 250 U. S. 525 (1919) where New Jersey was permitted to include the value of property outside New Jersey in computing the New Jersey inheritance tax upon a non-resident estate.

Taxation to two persons under the general property tax of the value supported by a single economic interest has been approved. The mortgagor and mortgagee may each be taxed for his ownership of the mortgaged property, even when the two interests are held in different states.

Paddell v. New York, 211 U. S. 446 (1908)
Welch v. Boston, 231 Mass. 155 (1915)
Hunt v. Perry, 165 Mass. 287 (1896)

Stock exchange seats may be taxed both where the exchange is located and also at the owner's domicile.

Rogers v. Hennepin Co., 240 U. S. 184 (1916)
Citizens Bank v. Durr, 257 U. S. 99 (1921)

A resident vendor's interest under a contract relating to foreign realty has been held taxable, and also a non-resident vendor's interest under such a contract affecting realty in the taxing state.

Rogers Estate, 149 Mich. 305 (1907)
State v. Probate Court, 145 Minn. 155 (1920)

From these cases it will be seen that a certain amount of double taxation has always been approved by the courts. Our suggestion is that the Court should recognize this condition, modifying the law as may be necessary, so as to protect the taxpayer, without going the length of cancelling all these cases by pushing a new theory to its limit.

Some double taxation has been invalidated by the recent cases,—but must all of it go? We say,—the other possibilities should be canvassed.

(*b*) *To accomplish a desirable object as a matter of principle.*

As a matter of principle both states should have the right to tax, whether or not as a matter of public policy they exercise the right.

The exercise by any state of a right of taxation which it may legally possess, is of course a matter of public policy for that state. For instance, like Alabama and Nevada, it may decide against any inheritance taxation. Like Florida, it may decide upon a limited estate tax law. As was formerly the case in Maine, it may decide upon a tax upon collateral inheritances, and not upon direct inheritances. It may decide to extend complete reciprocation to other states with reference to all intangible personal property by exempting the inhabitants of those states from taxation on intangible interests within the taxing state. As a matter of fact, this has become the policy of the State of Maine by statute passed since the death of Mr. Haskell. These are instances of what we conceive to be the proper exercise by the several states of their taxing power in accordance with their several views on public policy,—a general right which this court has not questioned.

The recent Supreme Court cases are a judicial determination in favor of complete reciprocation between all the states in the case of debtor-creditor obligations. This Court feels that constitutional provisions prevent the several states from taking differing views as to their local public policy on this particular point.

In the case of corporation shares, however, which have not yet been passed upon by this Court, there are definite reasons why the state of the incorporation and the state of the domicile should be left free to exact a death tax on the transfer if the states desire to do so, and if the taxpayer can be protected from unconscionable exaction. Take the cases of Maine and Massachusetts with reference to the transfer of this stock in the Great Northern Paper Company. Each state has a definite reason for taxing it. Maine incorporated and protects the corporation, and aids the shareholder to effectuate and transfer his ownership; Massachusetts protected the individual

shareholder, and aids in the settlement of his estate. Each reason is good,—each has been approved by the courts, we have seen. For either state to lose the tax would be indeed to yield to an unfortunate necessity.

The only reason for concentrating in the domiciliary jurisdiction the inheritance taxation of debtor-creditor obligations is the double taxation which otherwise occurs under complex modern conditions. The protection of the right of a state to regulate and tax its own corporations is, however, of such peculiar importance under the decisions which we have cited above as to give pause to the suggestion of overturning it merely for the sake of avoiding another evil. This may be equally true of any suggestion that the domiciliary state wholly yield to the state of incorporation. Is there any other way out? We think the record in the present case points the way, as we shall later discuss.

If one of these states is to yield, the avoidance of double taxation is the reason. Until the recent cases, if then, it has not been held that double taxation is so clearly wrong that one taxing jurisdiction must entirely yield to another. The theory has merely been, as the Court says in the *Farmers Loan* case, that "the right of one state to tax may depend somewhat upon the power of another so to do."

The leading case discussing the general principles is *Union Refrigerator &c Co. v. Kentucky*, 199 U. S. 194 (1905).

Strictly speaking, double taxation is paying twice over for the same measure of protection. Going back to fundamentals and starting with a state which wants money for public expenditures, and a citizen who has property, we naturally find the tendency on the part of the state to take it where it can get it, though multiple taxation pile upon the taxpayer, and on the part of the citizen to resist not only any payment, but particularly payments which impose a burden enevenly on him as compared with other persons. Taxation under any system of settled government has to be based on some principle other than the tyrannical principle of grabbing the money where it can be found.

In the case of property taxation two principles frequently come into conflict. The individual is protected where he lives, and his home government seeks to take from him taxes in proportion to his property stake. On the other hand, his property, not only tangible but also intangible, often exists under and is protected by various other jurisdictions.

The simplest case is real estate. There by long practice the doctrine has become established that only the jurisdiction which protects the property will take the tax. The owner may live in another community, and there have all the benefit of its laws without any contribution whatever to its maintenance, but that jurisdiction does not claim the right to tax him on his foreign real property, although by both income and excise taxes it may seek to get from him a contribution. Taxation of this real estate to the foreign owner has not been forbidden on the ground of double taxation, but on the ground that only in the place where it is situated does it exist as property under the protection of the laws. His income from it, received where he lives, may measure his tax obligation to his home state, but his ownership of the property itself is solely controlled by the state where it is situated and only that state should tax it.

The inheritance tax is a tax on a privilege, not on property; viz,—on the privilege of giving and getting, while a property tax is a tax on the right to a continued holding and owning of property. Death is the occasion for taking the toll known as the tax. For our purposes whether the tax is on the right of the deceased or on the right of the inheritor is immaterial. Without the protection of the law the transfer could not take place, and this privilege covers the whole transaction from the death of the deceased until the time when the property reaches its ultimate owner.

As a matter of theory, if this privilege requires the protection of the laws of several jurisdictions both should exact a tax. The double taxation is wrong not in theory but in practice. If the practice can be amended, the theory might stand unimpinged.

(c) *And as a matter of public policy.*

The practical reason for retaining taxation to some extent in both jurisdictions is well analyzed in the treatise prefixed to the Commerce Clearing House Inheritance Tax Service, Edition of 1928-30, where prior to the decision in the *Farmers Loan & Trust Company* case, the author in advocating the advisability of a qualified reciprocal clause, has this to say,—(C. C. H. February 5, 1929, p. 63).

> "It is indisputable that the operation of death tax laws based upon the theories of domicile and situs usually results in double and possible multiple burdens of taxation, borne as a class by the persons out of whose pockets the taxes come. It is equally indisputable that the operation of death tax laws upon either of these two theories alone results inevitably in loss of revenue to all the taxing states, and by the same token inevitably tends to result in *double avoidance of taxation* by the persons out of whose pockets the taxes should come and implies a break down of the death tax all around. Unqualified reciprocity is equally as dangerous to the revenue of the state as abstention from tax upon intangibles of non-residents. The only way out of the muddle is the adoption of a qualified reciprocal provision differing from the one heretofore recommended officially which will make certain that the taxpayer pay at most one tax either to the state of domicile or to the state of the situs, but does not permit of avoiding the death tax in both states."

Unless both states may tax there will be a complete escape from death duties in some estates of such size as to be within the scope of the state inheritance tax systems, though below the Federal estate tax minimum.

The nation as a whole will suffer. Methods of tax evasion will work when only one state has jurisdiction which will fail if two states can tax. An exemption of corporate shares in the state of incorporation where they can readily be located will put a premium on the concealment of assets in order to

escape taxation at the domicile. Moreover, contests over the domicile of the deceased person, always unsatisfactory, will remain as they are, of comparative infrequency, instead of bulking large in the courts.

As this Court has said, taxation is a practical matter, legal evasion is proper, but it is inconceivable that unless necessary for the sake of avoiding worse evils, this Court will give aid to those who seek to escape paying death duties.

The argument on policy and expediency should, of course, have no effect toward validating a tax fundamentally illegal, but may properly have force toward preserving an existing tax which is attacked because of its effect on the community.

The doctrine of the recent Supreme Court cases is based on a high degree of expediency,—viz, the prevention of double taxation under complex modern conditions. To offset that, we suggest other arguments from expediency which make for caution in extending the doctrine of those cases.

The prevailing opinion in the *Baldwin* case doubts the force of the argument that the property will escape taxation entirely unless it can be doubly taxed. This same point is made in the *Buck-Beach* case, as well as in the *Schlesinger* case in 270 U. S. p. 230 (1926), cited in the *Baldwin* case.

In the *Buck-Beach* case, however, the actual decision was that the property was not taxable, and the same is true in the *Schlesinger* case. In the *Buck-Beach* case the Court refused approval of a property tax on commercial paper temporarily within the taxing state for the purpose of escaping taxation in the home state. In the *Schlesinger* case the majority opinion refused approval of an inheritance tax on gifts within six years prior to the giver's death based on the conclusive presumption that these gifts were in contemplation of death. In both cases the tax was held fundamentally illegal. Mention of the practical considerations was, therefore, wholly dictum.

In the *Schlesinger* case moreover these practical considerations were referred to with reference to their effect in the Legislature and were not really for the Court.

In our case, however, we take the position that the tax imposed by Maine is a valid and legal tax under a long line of established cases. The tax will stand unless the preventing of double taxation under modern complicated circumstances requires giving up the tax as a matter of expediency and public policy. Our point is that practical considerations may properly be urged several ways; i. e., to argue for adequate tax revenue on a consistent theory and against over-emphasizing the dangers of double taxation from long established taxes, as well as to argue against the double taxation itself. As a matter of public policy it is our contention that some kind of tax outside of the domicile is required in order that the community may somewhere obtain a tax on estates of such size that they should be taxable under state but not under Federal laws.

So for the sake of "stare decisis" and for reasons both of principle and policy we submit that the State of Maine should be permitted to collect the tax in this case, regardless of the recent Supreme Court rulings in the *Farmers Loan & Trust, Baldwin* and *Beidler* cases.

V.

The Solution of the Problem of the Case

It is our contention that on the record in this case the problem of taxing these shares at the death of their owner can properly be solved just as it was by the taxing authorities of the two states concerned; i. e.,—by the collecting of a tax in each jurisdiction, Maine's tax carrying a credit for the Massachusetts tax. Section 4 of the Maine Act has operated in the case to give just the "qualified reciprocity" which the article in the C. C. H. quoted above advocates,—in short, *split* rather than *double* taxation.

In a nutshell,—the estate of a Maine resident would have had to pay Maine a $62,000 tax on this transfer,—this estate is asked to pay Maine less than half that sum, because more than half has been paid in Massachusetts.

We have urged the fundamental difference between corporate shares and debtor-creditor securities as a reason for warding off from corporate shares the application of the recent ruling made in the case of debts and credits. Granting this contention without more, this Court may feel that it may disregard entirely the Massachusetts aspect of the situation, and validate the present tax without anything more being said, making no comment on the rights of other persons who may in the future be taxed in Maine on their shares in Maine corporations prior to the fixing of a tax at their domicile.

But our belief is that the Court may properly go further, and validate the present tax on the express ground that the Maine tax has credited the Massachusetts tax.

Our contention that Maine may tax this transfer does not necessarily result either in the double taxation against which the rule is aimed, or in that complete loss of death tax income to either of the states which we have contended would be unfortunate. Our solution is that each state should tax, as it has done, one state with reference to the tax already paid in the other. The remedy for modern complexity in the case of shares of stock is not necessarily that either state yield entirely its right to a death tax. If this Court finds that the state whose tax is before it for action had yielded to the other state a portion of its own demand; i. e.,—has credited the amount of the other tax, then what occasion is there for this Court to interfere?

All this Court needs to do in this particular case is to rule that Maine has an ancient right to tax shareholders in its corporations on their property and transfers; that if that right is exercised in such a way as not to lead to a discrimination between residents and non-residents of Maine by a duplication of taxation on the non-resident estate at the full value on the transfer of the property, this Court has no reason for putting a brake on Maine's exercise of its right.

The "double taxation" which this Court has recently criticized is the complete duplication of taxes in two jurisdictions on the same transfer in the case of certain forms of security.

The majority of the Court in these three opinions considered the problem not from the point of view of the right of the taxing state to tax, but from the point of view of the taxpayer, and the Court solves his difficulties by requiring other states to yield completely to the state of the domicile in the case of these securities.

In other words, the Court says: the state where the instruments are kept or where the debtors live should lose out to the state of the domicile, because only one state should tax and the state of the domicile is the right one to do it. This involves the proposition whether there must necessarily be but one such state, before we reach the proposition which state.

The decisions in these recent cases, of course, solve the particular problem in those cases, and there that solution causes few new problems. The solution adopted seems to have been the only one considered by the Court as possible on the record in those cases if double taxation were to be avoided. There was apparently no possibility of a deduction by one state for taxes paid in the other. If the contested tax were allowed the tax was equivalent in each jurisdiction. It was all or nothing in each of the two states.

Now if we assume that this Court would have decided any or all of the three recent cases just as it did, had the Court been ruling upon a partial or split tax, our contention is that shares of stock are sufficiently different in kind from the securities there considered so that this Court should not extend the doctrine of those cases to shares of stock. *A fortiori* the way is open to the decision for which we contend in the present case if we assume that this Court would have decided those cases differently had its attention been directed to a split tax.

How does the situation differ in those cases from this? The Court goes on the basis that the domiciliary state had exacted full inheritance tax, without any attention to the possibility of a tax in the second state, and that the second state in turn was seeking to duplicate the payment without regard to the tax already paid in the domiciliary state,—exactly *double* taxation. But suppose the domiciliary state had awaited the outcome of the tax in the other state, and the tax in that other

state, first assessed in point of time, had come up for attention in this Court before the domiciliary state acted. Must this Court disapprove the tax simply on the ground that a second tax in the domiciliary state was *impending?* And suppose the tax in such other state had been paid, and the domiciliary state then sought to establish a tax for the difference between its own rate and the amount thus paid,—must this Court therefore disapprove the exaction?

We have in the present case still another situation,—the domiciliary state has gone ahead and exacted its tax; the other state seeks to collect the difference between that tax and the full tax that would be asked from a resident estate or a non-resident estate of a state not imposing a death duty. Must this Court disapprove this tax, even in the case of debtor-creditor securities,—*a fortiori* in the case of corporation shares?

We urge that it should not.

It was suggested in the majority opinion in the *Farmers Loan* case that one state's power to tax may depend somewhat on the power of another state. Of the citations *So. Pac. Co. v. Kennedy*, 222 U. S. 63 (1911) permits Kentucky to tax steamers of the Southern Pacific under the property tax, at the domicile of the corporation, and rules that enrolment at New York was immaterial, there being no permanent actual situs of the vessels at New York. The Court indicates that the vessels would not be taxable at Kentucky if actually located elsewhere,—a holding which was subsequently affirmed with respect to inheritance taxation in the *Frick* case. The Court was not concerned primarily with the power of New York to tax, but with the concrete question where the vessels were located. If located permanently in New York they could not be technically located in Kentucky; otherwise, they could. The case does not go far in valuing the effect of one state's tax on another state's right to tax, but certainly shows that it is a consideration to be considered by the Court.

Coe v. Errol affirms, as this Court has said,—

> "The rather obvious proposition that the mere fact of taxation of tangibles by one state is not enough to exclude the right of another to tax them."

Granting this major premise, our suggestion is that a different minor premise is called for in the present case from the contention of the estate for a complete escape from taxation in Maine. If Maine credits the Massachusetts tax, why doesn't that make Maine's tax "depend somewhat upon" Massachusetts?

Just how in fact, and as a matter of dollars and cents, the tax should be split, is, it seems to us, not for this Court to determine. In the absence of any showing of discrimination or confiscation this Court is not concerned with the proportion between tax exacted and benefit received which the estate mentions in its pleadings.

So also with the order in point of time in which the two taxes were assessed. It may be that logically the tax in Maine comes first in order; the amount of the tax in Massachusetts comes next. Just how it happened that in this particular case the estate settled its Massachusetts tax first and then used it as a credit in Maine, instead of settling in Maine and seeking credit in Massachusetts, is not clear on the record. It seems to us that these are matters of detail and administration not within the purview of the Court on this record. Our point is that this Court should affirm the judgment because on the record it can see that the proper general principle has been observed; viz,—a tax in Maine on a transfer taxable in Maine; without double taxation of the same interest, transfer and property, because credit has been duly given by Maine for the tax paid in Massachusetts.

While our contention is, as we have said, not inconsistent with the views of the majority of the Court as set forth in the opinions in the recent Supreme Court cases, it is obviously also not inconsistent with the views of the minority. They approach the problem from the point of view of the taxing jurisdiction and not from the point of view of the taxpayer's liability for the payment of more than one tax. They ask: Has the taxing state something it can tax? They do not ask: If the taxing state does tax this transfer, what is going to happen to the taxpayer? They follow *Coe v. Errol*, 116 U. S. 517 (1886)

which disregards the possible taxation of logs to their Maine owner as having any bearing on the validity of a New Hampshire tax on the logs while there located.

According to the minority, therefore, the concern of this Court is not with the Massachusetts but with the Maine tax; if the Maine tax stands on a valid basis, the Court need go no further. That it so stands, of course, our first premise. In the *Farmers Loan & Trust Co.* case the minority disagreed as to the degree, if any, of protection accorded by Minnesota to the securities, and hence as to the power of Minnesota to tax. In the *Baldwin* case they agreed that Missouri extended sufficient protection to justify it in taxing. In the present case, Maine's jurisdiction over its own corporation can hardly be disputed.

Affirming the Maine tax in this case therefore will neither run counter to the views of the majority nor the minority in the recent Supreme Court cases, and will exact from the estate a reasonable tax on proper principles for the benefit of both states.

C.

CONCLUSION.

On the record in this case it appears that the State of Maine originally made the effort to figure an inheritance tax on the transfer of shares of stock in the Great Northern Paper Company, a Maine corporation, owned at his death by a citizen of Massachusetts, in the sum of some $62,000 which disregarded the fact that the estate had already paid an inheritance tax of some $32,000 on the same transfer in Massachusetts. As a result of previous litigation this Massachusetts tax was credited, and a probate judgment decree for the net amount, some $30,000, entered up. We submit that the mandate of the Supreme Judicial Court of Maine entering up judgment for this tax should be affirmed, and this appeal dismissed because the tax levied in Maine is justified in principle as a tax on the transfer of an interest in a corporation created by and under the jurisdiction of Maine, which has substantially all its property located in that state. We therefore submit that the dangers of double taxation which led this Court in three recent cases to rule against the death taxation of debtor-creditor securities outside the creditor's domicile, should not induce this Court to set aside the tax, because there is a substantial difference in the kind of property here transferred; and because from affirming this tax will result not double but split taxation; viz,—the payment of a tax in Maine which takes account of and credits the tax already paid in Massachusetts.

December 1, 1931.

Respectfully submitted,

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REPLY BRIEF

1. There can be no doubt but that the tax in question is an excise tax on the devolution of property from the dead to the living, as the Estate claims in its brief, but prohibiting the tax on this theory does not invalidate the excise imposed by Maine. The devolution takes place in both states. By common consent among common law jurisdictions the laws of the domicile control in the final disposition of personal property wherever located. But property within the jurisdiction of the State of Maine and belonging to a Massachusetts decedent, whether it be real estate, tangible personalty or intangibles, passes from him at his death by virtue of the operation of the laws of Maine as well as of Massachusetts. The right of the State of Maine to exercise jurisdiction over its corporations and their shareholders by taxation, as in other respects, can hardly be seriously disputed on the cases, and there can be no doubt but that the State of Maine has hitherto exercised this jurisdiction without question not only in other respects but also by the taxation of the shares in its corporations under its inheritance tax on the death of their owners.

2. The State of Maine bases its power to collect the tax upon the operation not merely of the Maine statutes relative to stock transfers, but also of the Maine statutes which evidence and exercise the jurisdiction of the State over the complicated relationship known to the law as corporation and shareholders. This jurisdiction is by no means attenuated. It is concerned with much more than the mere fact that the transfer of stocks in Maine corporations can only be completely affected by an act effective under the laws of Maine.

3. The distinction between the *Farmers Loan*, *Baldwin* and *Beidler* cases, on the one hand and the present case on the other is the differing state of circumstances in those and this case. It is not a question of applying the same rule to identical circumstances. This is evidenced not only by the very fact that this case is before the Supreme Court at all, but also by the differing decisions which have been given by state courts

since the recent Supreme Court cases were decided, and by the great amount of public interest taken in the controversy which the present case brings before this Court.

4. As to the suggestion on Pages 22 and 23 of the brief for the Estate illustrating a point by reference to the Boston and Maine Railroad, two answers have been suggested to us by the Attorney General of Minnesota:

> (a). The matter of incorporating in more than one state is in the control of the incorporators. If they choose for convenience to form corporations in several states they should not be allowed to say that the exercise of the power of taxation by each of those states is unfair and inequitable, as it is a situation which they have brought upon themselves.
>
> (b). The legal effect of such a situation is that there are four separate and distinct corporate entities, not one corporation functioning in four states. Each of the four states has chartered a separate corporation, notwithstanding the fact that the same individuals may be the incorporators and stockholders in each of the four corporations.

5. The Legislature of the State of Maine has apparently not felt that it needed expressly to fix the situs of stock in Maine corporations within the State of Maine for the purpose of providing for the succession tax, because the right of the State to enforce this tax has never been questioned. As we have already said, it is not necessary that the tax should be defended simply on the basis of a situs in the sense that here is where the transfer of stock is recorded.

6. The last four lines on Page 30 of the brief are significant in view of the solution of the problem of the case which was adopted in the case itself and for which the State's brief argues on general principles. If, as the Estate's brief suggests, "The Executor had no choice except to pay the inheritance tax in Massachusetts," is not justice accomplished, when later the State of Maine credits the amount of that tax upon its own tax?

7. We certainly doubt the statement on the 31st page of the Estate's brief that, "The occurrence of a single transfer of property in more than one state is an impossibility." If the decedent lives in one place and his property is in another, the two states may agree or disagree as to the incidents of its transfer at his death. If one state yields to the other it is on reasons of comity and not in denial of the fact that property here located has been here transferred.

8. To summarize our position in two sentences: the Estate argues two points,—First, that Maine has no right to tax the transfer of this property, and secondly that the circumstances are substantially the same in this as in the recent Supreme Court cases. Both these contentions we have attempted in our brief to meet and deny and in addition, we suggest that the outcome which we seek in the particular case works out justice and illustrates a principle which this Court can properly approve.

Dated December 3, 1931.

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